

that "surface relief means" on the exterior of the balloon, to provide channels when the balloon is inflated as recited in claim 41, is disclosed by Lubock's showing of a second balloon enclosing the first balloon.

Concerning claims 135 to 137, which are copied from Lubock's Serial No. 10/290,002, these claims in the current application were rejected under 35 U.S.C. 135(b)(2), but this section does not actually apply in the current situation. The Examiner states the current application failed to claim the subject matter of claims 135-137 prior to one year from the date on which 2004/0087827 (the '002 application) was published. However, the wording of the statute is otherwise. Section 122(b)(2) specifically applies its one year limitation only to "an application filed after the application is published." The current applicant's patent application was filed October 10, 2003, prior to publication of either of the Lubock applications in question. There is no one-year limitation for making claims 135-137 in the current application which was not filed after the Lubock application was published.

In the action the drawings were objected to as not showing "the vacuum source". Thus, an amended version of Figure 23 is now submitted, indicating an aspirator shown schematically as attachable to the drainage port 34. The aspirator, as supported below, is "a vacuum source".

Finally, and importantly, are the Examiner's arguments at pages 4 and 5 citing 35 U.S.C. §112, first paragraph, finding the applicant's Rule 131 declaration insufficient, and regarding the applicant's proper support for claiming a vacuum port, vacuum lumen, or application of vacuum. This boils down to the Examiner's statement on page 5 of the action,

"However the examiner's position is that suction does not equal vacuum. Suction is defined as a process of exerting a force by reason of reduced air pressure over part of its surface, while vacuum could include a space partially exhausted by artificial means but in its broadest reasonable interpretation a vacuum also includes a state of isolation. Therefore a vacuum is not equal to suction in that the device could merely be isolated from its surrounding area and not necessarily be providing any type of suction."

First, from the Examiner's brief comments regarding the applicant's Rule 131 declaration it is assumed the Examiner is referring to the suction/vacuum issue as the only insufficiency in the detailed Rule 131 declaration which has been submitted in this case. No other insufficiency is specifically stated. The Rule 131 declaration states more than sufficient facts, supported by data and exhibits and attested to by the inventors, as required by the statute and case law.

Second, at every instance where Lubock or the applicant uses the word "vacuum" or the word "suction", the meaning is the same. Lubock's use of the word "vacuum" is never referring to a perfect vacuum, nor is it ever referring to a "state of isolation", and

the pertinence of this latter expression is questionable. Apparently the Examiner refers to a definition of vacuum in the context of something like "One cannot make such a decision in a vacuum", which is the word as sometimes used under the definition "a state of isolation". This has absolutely nothing to do with the current situation. The fact that the term can have some far-field definitions for other usages does not detract from its meaning as "suction" at every instance here.

Further, note claim 136, copied from the '002 application, claim 31. This claim, originating in the Lubock application, recites a vacuum conduit, and a vacuum port connected to the conduit and "configured to provide suction" adjacent to the balloon, etc. This certainly confirms that Lubock equates the term "vacuum" as used in his application to "suction". The fact that Lubock's claims 29, 31 and 32 were later cancelled is of no moment here; the wording of Lubock's claim 31 is cited to show Lubock used the terms interchangeably. See also Lubock's patent issued from the '002 application, Patent No. 6,923,754, having a disclosure identical to that of the '002 application. In the patent, col. 2, l. 58 et seq. state

features of the invention may include a vacuum delivery element such as a sheath or a balloon configured to provide **vacuum** effective to apply **suction** to tissue adjacent the assembly's end devices. **Vacuum** delivery elements are preferably configured to apply **suction** to tissue adjacent a treatment delivery assemblies . . . **Suction** is effective to

draw surrounding tissue close to the surface of a treatment assembly, or to a **vacuum** delivery element . . . [emphasis added]

Throughout the patent the terms "suction" and "vacuum" are used completely interchangeably and with the same meaning. For example, compare col. 4, l. 21 et seq. to col. 7, l. 42 et seq. and col. 8, l. 23 et seq. The col. 4 passage states

devices, systems and methods having features of the invention utilize **suction** to draw tissue against a device surface within a body cavity . . . [emphasis added]

The col. 7 passage states

The **vacuum** may be effective to draw adjacent tissue toward and into contact with a sheath 50 or an outer balloon 14 . . . [emphasis added]

The col. 8 passage states

Application of **suction** is effective to enhance contact with a device 12 . . . [emphasis added]

Additionally, please see the enclosed definitions for "aspirator", taken from Dictionary.com, especially the definition from Merriam-Webster's Medical Dictionary, 2002:

Aspirator: An apparatus for removing fluid from a body cavity, consisting usually of a hollow needle and a cannula, connected by tubing to a container in which a vacuum is created by a syringe or a suction pump.

This definition is attached as Attachment A.

See also the definition from Webster's New Universal Unabridged Dictionary, Simon & Schuster 1983 (Attachment B), as follows:

Aspirator: 1. in medicine, an apparatus using suction to remove a fluid or gas from a body cavity. 2. an instrument for creating a vacuum, or for passing a current of air through fluids, gases, etc.

This definition additionally confirms that "suction" and "vacuum" are used interchangeably, in cases where "vacuum" does not refer to a perfect vacuum but a partial vacuum. This is the case in every instance in the current application and the Lubock applications.

In view of the manner in which "vacuum" is used in the Lubock application, it is manifest that the applicant's drainage port, to which an aspirator is adapted (as stated in the claims and the specification), is certainly a vacuum port in the same sense as in Lubock. The aspirator applies the vacuum. Whether "suction" has exactly the same meaning as "vacuum" in every possible definition of either of the words is not at issue here. The issue is whether the uses of these words is essentially

equivalent, meaning essentially the same thing, in both cases. The answer is yes. The uses are precisely the same, as shown in Lubock's disclosure.

Even further confirmation is found in the Examiner's comments at the bottom of page 2 of the action. The Examiner says while Lubock does "not specifically teach allowing liquids to drain via the channels [to which the current applicant applies an aspirator, drawing vacuum], the channels are connected to a vacuum source to provide a vacuum to conform the body cavity to the outer balloon. In providing a vacuum to conform the body cavity the device would inherently suction out any liquids that happen to be in the body cavity." This further proves the applicant's case, because the converse is obviously also true. In suctioning out any fluids that happen to be in the body cavity, as does the applicant, this inherently and by definition removes fluid matter between the balloon and the body cavity and therefore closes this space, necessarily conforming the body cavity to the balloon. The effects of fluid removal and closing the space go hand in hand, both achieved by applying suction (vacuum). Therefore the applicant performs the method of the copied claims.

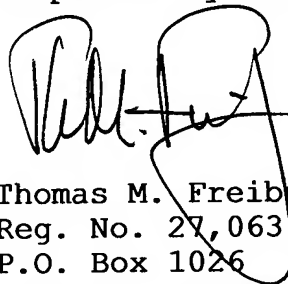
It is noted that '002 application claims 29, 31 and 32 were cancelled prior to issuance of the Lubock patent, Patent No. 6,923,754. Thus, the applicant's claims 135 - 137 are no longer

directly interfering claims relative to this particular issued patent. They are, however, retained in the application and the applicant points out that these same three claims now appear as claims 29, 31 and 32 in SenoRx's pending application No.

11/155,789, (Pub. No. 2005/0240074), a full continuation of the '002 application. Thus the applicant's request for declaration of interference applies to those pending claims. Interference is specifically requested with respect to claims 29, 31 and 32 of Lubock application No. 11/155,789.

Favorable action is solicited.

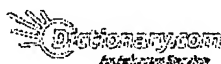
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Freiburger', written over a circular stamp or seal.

Date: November 12, 2009

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ATTACHMENT A



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See P. 2

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as-pi-ra-tor [as-puh-rey-ter] Show IPA

### -noun

- an apparatus or device employing suction.
- Hydraulics.* a suction pump that operates by the pressure differential created by the high-speed flow of a fluid past an intake orifice.
- Medicine/Medical.* an instrument for removing body fluids by suction.

### Origin:

1860-65; ASPIRATE + -OR <sup>2</sup>

Dictionary.com Unabridged

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as-pi-ra-tor (äs'pə-rä'tor) Show IPA

n.

- A device for removing liquids or gases by suction, especially an instrument that uses suction to remove substances, such as mucus or serum, from a body cavity.
- A suction pump used to create a partial vacuum.

The American Heritage® Dictionary of the English Language, Fourth Edition

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### Aspirator

As'pi·ra'tor, n. 1. (Chem.) An apparatus for passing air or gases through or over certain liquids or solids, or for exhausting a closed vessel, by means of suction.

2. (Med.) An instrument for the evacuation of the fluid contents of tumors or collections of blood.

Webster's Revised Unabridged Dictionary. © 1996, 1998 MICRA, Inc.

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Language Translation for : aspirator

Spanish: **aspiradora** **aspiradora**, German: **der Sauger**,  
Japanese:

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Main Entry: as-pi-ra-tor

Pronunciation: 'as-pə-'rät-ər

Function: noun

: an apparatus for producing suction or moving or collecting materials by suction; *especially* : a hollow tubular instrument connected with a partial vacuum and used to remove fluid or tissue or foreign bodies from the body

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**aspirator** as·pi·ra·tor (ās'pə-rā'tor)

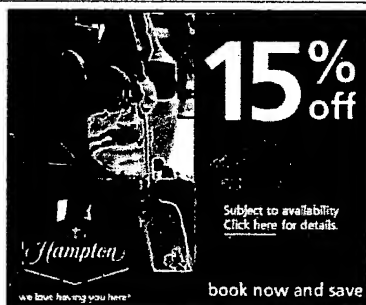
*n.*

An apparatus for removing fluid from a body cavity, consisting usually of a hollow needle and a cannula, connected by tubing to a container in which a vacuum is created by a syringe or a suction pump.

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## aspiration

## ATTACHMENT B

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**aspir'ation**, *n.* 1. (a) the pronunciation of a letter, etc. with an aspirate; (b) an aspirate.  
2. a breathing or breathing in; a breath.  
3. the act of aspiring or of ardently desiring; an ardent wish or desire, particularly for advancement, honor, etc.  
4. the removal by suction of fluid or gas from a body cavity.  
Syn.—ambition, longing, craving, desire, hope, wish.  
**aspir'a-tōr**, *n.* 1. in medicine, an apparatus using suction to remove a fluid or gas from a body cavity.  
2. an instrument for creating a vacuum, or for passing a current of air through fluids, gases, etc.; much used in the chemical analysis of gases.  
**aspir'a-tōry**, *a.* of or suited for breathing or suction.  
**aspire**, *v.i.*, *aspired*, *pt.*, *pp.*; *aspiring*, *ppr.* [ME. *aspire*; Fr. *aspirer*; L. *aspirare*, to breathe upon, to aspire to; Gr. *aspirein*, to pant for breath.]  
1. to exhale. [Rare.]  
2. to desire with eagerness; to long or seek for advancement, honor, etc.; followed by *to* or *after*, as, *to aspire to the presidency*.  
3. to rise; to ascend; as, the flames *aspire*. [Archaic.]  
Syn.—desire, aim, seek, long, rise, mount, ascend, soar.  
**aspire'**, *n.* aspiration. [Obs.]  
**aspiration**, *n.* aspiration. [Obs.]  
**aspir'er**, *n.* one who aspires.  
**aspir-in**, *n.* [G. from *acetyl*, and *spir'saure*, salicylic acid; and *-in*.]  
1. a white, crystalline powder, acetyl-salicylic acid,  $C_{17}H_{15}O_6$ , used for reducing fever, relieving headaches, etc.  
2. a tablet of this.  
**aspir'ing**, *a.* ambitious; animated with an ardent desire for power, importance, or excellence; as, an *aspiring* citizen.  
**aspir'ing-ly**, *adv.* in an aspiring manner.  
**aspir'ing-ness**, *n.* the state of being aspiring.  
**aspl'ish**, *a.* resembling an asp.  
**asplanch'nic**, *a.* [Gr. *a priv.*, and *splanchna*, bowels,] in zoology, lacking an alimentary canal.  
**Asplē-ni-um**, *n.* [Gr. *asplēnion*, the spleenwort, a fern; *a*, euphonic, and *splēn*, spleen.] a large genus of ferns, the spleenworts, belonging to the order *Polypodiaceae*. Among the best-known species are the *Asplenium Ruta-muraria*, or wall rue, and the *Asplenium Trichomanes*, or maidenhair spleenwort.  
**aspor'ta-tion**, *n.* [L. *asportatio*, a carrying away; *ad*, from, and *portare*, to carry.]  
1. a carrying away.  
2. in law, the felonious removal of goods from the place where they were deposited.  
**as-sprawl**, *u.* and *adv.* sprawling(ly).  
**as-squat**, *a.* squatting.  
**as-squint**, *a.* and *adv.* with a squint; out of the corner of the eye.  
**assa**, *n.* [ME. *asse*, *asse*; OFr. *asne*; AS. *assa*; L. *asinus*, ass.]  
1. a quadruped, *Equus asinus*, of the same genus as the horse, but smaller. It has long ears and a short mane. The tame or domestic ass is slow, but very sure-footed, and for this reason very useful on rough, steep ground; also called *donkey*, *burro*.  
2. a dull, stupid fellow; a dolt; a fool; from the fabled obstinacy and stupidity of the animal.  
*asses' bridge*, the fifth proposition of the first book of Euclid, stating that the base angles of an isosceles triangle are equal; so called from the difficulty of learners in grasping it.  
*to make an ass of oneself*; to act or talk foolishly.  
**assa**, *n.* arse; vulgar term. [Slang.]  
**āsa**, *n.* [Scot.] sing. of *ashes*.  
**as-sā-cū**, *as-sā-cōu*, *n.* [Braz.] a euphorbia-cous tree (*Hura crepitans*) of South America, the bark and sap of which contain a poisonous acrid principle.  
**as-sā-fet'i-dā**, *as-sā-foet'i-dā*, *n.* asafetida.  
**as-sā-gai**, *as-sā-gai*, *n.* [Fr. *archegais*, from Ar. *az-zaghāyah*, the spear.]  
1. a kind of javelin or throwing spear, often with an iron tip, used by some South African tribes.  
2. in botany, a tree of the dogwood family, from which the South African natives make their spears.  
**as-sā-gai**, *as-sā-gai*, *v.i.* to pierce with an assagai.  
**as-sā'i**, *adv.* [It. *assai*, very much; from L. *ad*, to, and *satis*, enough.] in music, very; as in

*adagio assai*, very slow; *allegro assai*, very quick.  
**as-sā'i'** (as-sā'i'), *n.* [native name.]  
1. a palm tree of Brazil, the *Euterpe edulis*.  
2. a beverage made from the fruit of this tree.  
**as-sā'il**, *v.i.*; *assailed*, *pt.*, *pp.*; *assailing*, *ppr.* [ME. *assailen*; OFr. *assailir*; L. *assilire*, to spring upon; *ad*, to, and *salire*, to leap.]  
1. to leap or fall upon with violence; to assault; to attack suddenly.  
2. to attack with arguments, censure, abuse, criticism, appeals, entreaties, and the like, with a view to injure, bring into disrepute, or overcome mentally or morally.  
3. to face or take up (a difficulty, task, etc.) with determination.  
Syn.—encounter, assault, fall upon, invade, attack, storm.  
**as-sā'il-able**, *a.* that can be assailed or attacked.  
**as-sā'il-ant**, *n.* [Fr. *assaillant*.] one who assaults, attacks, or assaults.  
**as-sā'il-ant**, *a.* assaulting; attacking; assailing.  
**as-sā'il'er**, *n.* one who assails.  
**as-sā'il-ment**, *n.* assault; attack.  
**as-sā-mār**, *n.* [L. *assus*, roasted, from *assare*, to roast, and *amarus*, bitter.] the bitter substance formed during the process of roasting meat, bread, starch, sugar, and the like till they are browned; a former designation.  
**As-sām-ēp'**, *a.* of or pertaining to Assam, a state of northeastern India, or to its inhabitants, language, etc.  
**As-sām-ēp'**, *n.* 1. *pl.* *As-sām-ēp'*, a native or inhabitant of Assam.  
2. the Indo-European, Indic language of the Assamese.  
**as-sā-pān'**, *as-sā-pān'ic*, *n.* [native Am. Indian name.] the flying squirrel of the eastern United States.  
**as-sārt**, *n.* [OFr. *assarter*, to grub up; LL. *ex-sartare*; from L. *ex*, out, and *sartire*, to hoe.]  
1. in old English law, a grubbing up of trees and bushes so as to make forest land arable.  
2. a piece of land cleared in this way.  
**as-sārt**, *v.i.* to grub up (trees and bushes) so as to make forest land arable.  
**as-sā-sin**, *n.* [Fr. *assassin*, from Ar. *hashsh-shin*, hashish eaters, from *hashish*, hemp.]  
1. [A-] a member of a secret band of hashish-eating Moslems who killed Christian leaders during the Crusades.  
2. a murderer who strikes suddenly and without warning; now generally used of the hired or delegated killer of some politically important personage.  
**as-sā-sin**, *v.i.* to assassinate. [Obs.]  
**as-sā-sin-ate**, *v.i.*; *assassinated*, *pt.*, *pp.*; *assassinating*, *ppr.* 1. to murder by surprise or secret assault, as an assassin does.  
2. to harm or ruin (one's reputation, etc.).  
Syn.—kill, murder, slay.  
**as-sā-sin-ate**, *n.* an assassination or an assassin. [Obs.]  
**as-sā-sin-ā-tion**, *n.* an assassinating or being assassinated; the act of killing or murdering, by surprise or secret assault.  
**as-sā-sin-ā-tōr**, *n.* one who assassinates; an assassin.  
**as-sā-sin bug**, any of a number of related insects having a curved, sucking beak and living chiefly on the blood of other insects.  
**as-sā-sin-ous**, *a.* murderous. [Obs.]  
**as-sā'tion**, *n.* [L. *assare*, to roast.] a roasting. [Obs.]  
**as-sault**, *n.* [ME. *assaut*; OFr. *assaut*, *assalt*, assault, from L. *ad*, to, *salutare*, to leap.]  
1. an attack or violent onset, as with blows or weapons, whether by an individual, a company, or an army.  
2. an attack by hostile words or measures; as, an *assault* upon the constitution of a state; also, an attack by argument or appeal.  
3. rape; a euphemism.  
4. in law, an unlawful threat to harm another physically, or an unsuccessful attempt to do so.  
5. in military science, (a) a sudden attack upon a fortified place; (b) the concluding stage of an attack.  
Syn.—attack, onset, onslaught, storm, charge.  
**as-sault**, *v.i.* and *v.i.*; *assaulted*, *pt.*, *pp.*; *assaulting*, *ppr.* to make an assault (upon).  
Syn.—encounter, assail, engage, attack, invade, storm, charge.  
**as-sault-able**, *a.* capable of being assaulted.  
**as-sault and bat'tery**, in law, the carrying out of threatened physical harm or violence; beating or hitting a person.

**as-sault'er**, *n.* one who assaults, or violently attacks.  
**as-sāy'**, *n.* 1. in metallurgy, the determination of the quantity of any particular metal in an ore or alloy; especially, the determination of the quantity of gold or silver in coin or bullion.  
2. the substance to be assayed.  
3. in law, an examination of weights and measures by a standard; now historical.  
4. trial; effort; attempt. [Obs.]  
5. ascertained purity or value. [Obs.]  
Pearls and precious stones of great assay.  
—Spenser.  
6. an examination or testing, as of quality, fitness, etc.  
**as-sāy'**, *v.t.*; *assayed*, *pt.*, *pp.*; *assaying*, *ppr.* [ME. *assayen*; OFr. *assaier*, *essaier*, to try, from LL. *exagium*, a weighing out, from L. *exigere*, to weigh, try; *ex*, out, and *agere*, to drive.]  
1. to make an assay of; test; analyze.  
2. to attempt; to try. [Obs.]  
**as-sāy'**, *v.i.* 1. to attempt, try, or endeavor. [Obs.]  
2. to be shown by analysis to contain a specified proportion of some precious metal; as, this ore *assays* high in gold.  
**as-sāy-able**, *a.* capable of being assayed.  
**as-sāy'bal-ance**, a balance used in the process of assaying.  
**as-sāy'er**, *n.* one who assays.  
**as-sāy'fūr-nace**, a furnace used in the process of assaying.  
**as-sāy'ing**, *n.* the determination of the amount of any particular metal in an ore or alloy.  
**asse**, *n.* in zoology, a small African fox. *Vulpes caama*, yielding a valuable fur.  
**ass ear**, an old name for the common comfrey, *Symphylitum officinale*.  
**as-se-cu-rā-tion**, *n.* assurance; a making sure. [Obs.]  
**as-se-cure**, *v.t.* [L. *ad*, to, and *securus*, secure.] to make sure. [Obs.]  
**as-se-cu-tion**, *n.* [L. *assequi*, to follow after.] an obtaining or acquiring. [Obs.]  
**as-se-gai**, *n.* see *assagai*.  
**as-sem'blage**, *n.* 1. a collection of individuals or of particular things; as, an *assemblage* of men or notes.  
2. the act of assembling or the state of being assembled.  
3. the act of fitting together, as parts of a machine; also, a whole that results from such fitting together.  
Syn.—collection, concourse, convention.  
**as-sem'blance**, *n.* 1. representation; semblance. [Obs.]  
2. an assembling. [Obs.]  
**as-sem'ble**, *v.t.*; *assembled*, *pt.*, *pp.*; *assembling*, *ppr.* [ME. *assemblen*; OFr. *assembler*, *assembler*, to assemble, from L. *ad*, to, and *simul*, together.]  
1. to collect (a number of persons or things) into one place or body; to bring or call together; to convene; to congregate; as, *to assemble* an army corps.  
2. to put together the parts of; as, *to assemble* a bicycle.  
Syn.—collect, convene, convolve, gather, muster.  
**as-sem'ble**, *v.i.* to meet or come together; to convene, as a number of individuals; as, Congress *assembles* every winter.  
**as-sem'ble**, *v.i.* to compare. [Obs.]  
**as-sem'bler**, *n.* one who assembles.  
**as-sem'bling**, *n.* 1. a collection or meeting together.  
2. the bringing or fitting together of the different parts of an article or machine, as a bicycle, gun, or sewing machine.  
**as-sem'by**, *n.* [ME. *assemble*, *assembleye*; OFr. *assemblee*, an assembly.]  
1. an assembling or being assembled.  
2. a company or collection of individuals in the same place, usually for the same purpose; an assemblage.  
3. in a civil or political sense, a meeting convened by authority for the transaction of public business; as, the *assemblies* of the Roman people; the *assembly* of the states-general, and the national *assembly* in France.  
4. [A-] in some States of the United States, the legislature, or the lower branch of it.  
5. in the Presbyterian Church, a convocation, convention, or council of ministers and ruling elders, delegated from each presbytery; in full, *General Assembly*.  
6. in military tactics, the drumbeat or bugle call summoning a body of troops to form ranks.

ase, bull, brute, turn, up; cry, myth; cat, machine, ace, church, chord; gem, afiger, (Fr.) bon, as; this, thin; azure